No. 03-18-00759-CR

IN THE
COURT OF APPEALS
OF THE
THIRD SUPREME JUDICIAL DISTRICT

Jessie Lee Brooks, Jr

v.

The State of Texas

APPELLEE'S BRIEF

Appeal from the 20th Judicial District Court
Milam County, Texas
Trial Court Cause No. CR 25,688

Milam County District Attorney's Office
204 N Central
Cameron, TX 76520
(254) 697-7013
(254) 697-7016 – Facsimile
daoffice@milamcounty.net
State Bar No. 24092518

ORAL ARGUMENT NOT REQUESTED

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Texas Constitution

Statutes

Rules

ISSUES PRESENTED

I. Under the standard set forth by *Jackson v. Virginia*, is evidence legally sufficient to affirm the jury's verdict of guilty on aggravated assault by threat.

II. Under the separation of powers provision of the Texas Constitution are court costs assessed against appellant facially unconstitutional, specifically the court costs for (1) Clerk's fee, (2) Jury Reimbursement Fee, (3) Indigent Defense Fee, (4) Administrative Transaction Fee, and (5) Fee for Serving Writ.[1]

III. Under article 42.01, Code of Criminal Procedure, should the judgment be modified to correct clerical errors.

---

[1] Appellant's 3rd point of error is intentionally omitted. State concedes that if the Court were to find the court costs set out in Issue Two unconstitutional, the Court should modify the judgment to reduce the court costs accordingly as the *Salinas* court did. State does not believe that this would constitute a separate point of error but is merely the remedy should the Court find any of these costs unconstitutional on this point of error.

SUMMARY OF THE ARGUMENT

I. Under the standard set forth in *Jackson v. Virginia*, the evidence presented was sufficient to uphold a conviction for aggravated assault with a deadly weapon by threat. Evidence showed that the Appellant repeatedly hit the victim with a 2X4, the victim was aware of the threats made with the 2X4, and the victim asked Appellant why he was hitting her to which Appellant replied that victim "needed to hit."

II. Under the separation of powers in the Texas Constitution, each of the court costs complained of is allocated to a criminal justice purpose and is therefore constitutional.

III. The clerical errors pointed out by the Appellant should be corrected by the Court to reflect the facts in this case.

ARGUMENT

I. Under the standard set forth by Jackson v. Virginia, the evidence is legally sufficient to affirm the jury's verdict of guilty on aggravated assault by threat.

Standard of Review

The only standard a reviewing court should apply in determining whether evidence is sufficient to support each element of a criminal offense is the standard from *Jackson v. Virginia*, 443 U.S. 307 (1979). *Brooks v. State*, 323 S.W.3d 893, 895 (Tex. Crim. App. 2010). The *Jackson v. Virginia* standard is fairly characterized as, considering all of the evidence in the light most favorable to the verdict, was a jury rationally justified in finding guilt beyond a reasonable doubt. *Id.* at 899.

Discussion

In pertinent part, a person commits an offense if the person commits an assault as defined in Section 22.01 of the Penal Code and the person uses or exhibits a deadly weapon during the commission of the assault. Tex. Pen. Code § 22.02(a)(2). A method of assault as defined in Section 22.01 of the Penal Code occurs when a person "intentionally or knowingly threatens another with imminent bodily injury." Tex. Pen. Code § 22.01(a)(2). Indeed, that is the method alleged by the State in this case. C.R. 5.

It is well established that threats can be conveyed by action or conduct as well as words and are not limited to merely a verbal manner. *McGowan v. State*, 664 S.W.2d 355, 357 (Tex. Crim. App. 1984). In *McGowan*, two separate verdicts for assault by threat were appealed. *Id.* at 357. After a prior run in with the defendant that day, a 14 year-old and her mother were required to go through a small alley on their way home from a nearby grocery store. *Id.* There, the appellant pushed the 14 year-old on the ground and began beating her, stabbed her in the stomach, and began kicking her. *Id.* After being stabbed, the 14 year-old saw the appellant holding an open pocket knife and testified that she then asked appellant not to cut her. *Id.* In contrast, the mother was stabbed in the back of the head, did not see what she had been hit with, and appellant immediately ran off after stabbing the mother. *Id* at 357-58. While the Court of Criminal Appeals recognized that the evidence was insufficient to show a threat was made against the mother, the evidence was sufficient to uphold the conviction for aggravated assault by threat against the 14 year-old victim. *Id.*

Here, the Appellant would have you believe this set of facts is the same as the mother in *McGowan. See* App. Br. pp. 32-33. But the facts are actually more similar to those of the 14 year-old victim than her mother. Here, the victim testified that Appellant was hitting her with a 2x4 board and gave her bruises all over as she was trying to protect herself. R.R. Vol 4. P. 164. The victim continued to testify that Appellant was constantly, continuously hitting her even as a partial tooth came out. R.R. Vol. 4 P. 165. This is similar to the 14 year-old in McGowan, who was stabbed,

kicked, and beaten and was aware of the deadly weapon being employed by that appellant and is dissimilar to the single stab wound of the mother who did not even know what she had been hit with and whom the appellant ran away from following the single wound. Likewise, in her written statement, the victim explained that "I told Jessie that he was hurting me so he told me I need to hit. So he kept hitting me with the board…" R.R. Vol. 7 Pp. 4-5. This again is similar to the 14 year-old in *McGowan* who asked that appellant to stop, rather than the mother who had the appellant leave the scene without even knowing what she had been hit with, much less talking to him.

In conclusion, the evidence shows that there was repeated hitting by the Appellant, the victim was aware of what was occurring and aware of the threat, and even conversed with the Appellant in a manner similar to the 14 year-old in *McGowan.* Thus, as in the case of the 14 year-old in *McGowan*, the evidence is sufficient to support the finding by a rational jury convicting Appellant of aggravated assault by threat.

The difference in the manner and means of the threat proven at trial was an immaterial, non-statutory variance.

Appellant seems to propose that if you do find evidence of a non-verbal threat only, then there is at least an arguable requirement that the State was required to prove up a verbal threat. The claim relies on a belief that any non-verbal threat would be a material variance from the indictment. But even if the Court determines that

there was only a non-verbal threat proved where a verbal threat was alleged, it is an immaterial variance.

As the Appellant notes, under the Burrell exception, any descriptive matter included in the indictment was required to be proven as alleged, even though needlessly stated. *Burrell v. State*, 526 S.W.2d 799, 802 (Tex. Crim. App. 1975), overruled by *Gollihar v. State*, 46 S.W.3d 243 (Tex. Crim. App. 2001). However, under the current standard the State does not need to prove an unnecessary allegation. *Gollihar v. State*, 46 S.W.3d 243, 256-57 (Tex. Crim. App. 2001).

Variances can be classified into three categories, depending upon the type of allegation that the State has pled in its charging instrument but failed to prove at trial; (1) a variance involving statutory language that defines the offense, (2) a variance involving a non-statutory allegation that describes an allowable unit of prosecution element of the offense, or (3) other immaterial non-statutory allegations. *Johnson v. State*, 364 S.W.3d 292, 298-99 (Tex. Crim. App. 2012). Variances of the first type are always material and render evidence legally insufficient, variances of the third type are never sufficiently material to render the evidence legally insufficient, while variances of the second type may render the evidence insufficient if they are material. *Id.* Here, the variance, if any, is of the third type; an immaterial non-statutory allegation.

In *Johnson*, the appellant in the case was likewise charged with aggravated assault, though in that case it was by causing serious bodily injury. *Id.* at 298. There, the indictment alleged that the acts causing the serious bodily injury were "hitting the

victim with his hand" and "twisting the victim's arm with his hand." *Id.* But the State only proved the act of "throwing the victim against the wall." *Id.* The Court of Criminal Appeals found that defining which act caused the injury does not define or help define the allowable unit of prosecution for this type of aggravated-assault offense, so the variance could not be material. *Id.* In the present case, the indictment charged threat of imminent bodily injury "by telling her that he was going to end her life." I C.R. 5. However, the State, under a finding that only a non-verbal threat was proven, would have only proven the threat of imminent bodily injury by brandishing a 2x4 wooden plank. As in *Johnson*, the Court should find that such a difference in manner and means is immaterial.

Appellant argues because the Court in *Landrian* defined assault by threat as a conduct oriented offense that means that, if facts provided, Appellant could be charged separately for both an aggravated assault with a verbal threat and an aggravated assault with a non-verbal threat. Appellant Br. 29-30. However, this argument directly contradicts this Court's opinion in *Marinos v. State*, 186 S.W.3d 167, 175 (Tex. App. – Austin, 2006, pet. ref'd), which was even reiterated by the Court of Criminal Appeals in *Landrian. Landrian v. State*, 268 S.W.3d 532, 540 [FN 42](Tex. Crim. App. 2008).

In *Marinos*, a jury found the appellant guilty of aggravated assault with a deadly weapon. *Marinos*, 186 S.W.3d at 171. The State had alleged two counts of aggravated assault with three paragraphs alleging aggravated assault by bodily injury and two

paragraphs alleging aggravated assault by threat. *Id.* at 172. But in a single application paragraph, the trial court authorized appellant's conviction on any or all of the five paragraphs contained in the two counts. *Id.* When conducting a sufficiency review, the Court found that evidence was factually sufficient to support a finding beyond a reasonable doubt. *Id.* at 173. However, they also considered jury unanimity, noting that while the aggravated assault by injury should have been separated in the charge from the aggravated assault by threat, the various manners and means of threats alleged were not required to have separate findings. *Id.* at 174-75. Likewise, *Landrian* explained that jury unanimity was not required "with respect to the specific manner or means by which the aggravated bodily injury assault or aggravated assault by threat was committed." *Landrian*, 268 S.W.3d at 540 [FN 42], quoting from *Marinos*, 186 S.W.3d at 175.

Here, whether the threat was verbal or the threat was non-verbal is just a different manner and means of the aggravated assault by threat. Therefore, the Court should follow its prior rulings and decline to make a new rule that any charge on aggravated assault by threat must also include whether the threat was verbal or non-verbal.

II. Under the separation of powers provision of the Texas Constitution the court costs assessed against appellant are constitutional as the purpose for each is for criminal justice purposes.

Standard of Review

The constitutionality of a criminal statute is reviewed *de novo* as a question of law. *Ex Parte Lo*, 424 S.W.3d 10, 14 (Tex. Crim. App. 2013). However, the reviewing court must presume that the statute is valid and that the legislature has acted neither unreasonably nor arbitrarily. *Rodriguez v. State*, 93 S.W.3d 60, 69 (Tex. Crim. App. 2002). In a facial challenge, as Appellant raises here, the party challenging the statute, therefore, has the burden to establish unconstitutionality and the statute must be upheld if the court can apply any reasonable construction that will render it constitutional. *Maloney v. State*, 93 S.W.3d 613, 626 (Tex. App. – Houston [1st Dist] 2009, pet. ref'd). Thus, a facial challenge to a statute is the most difficult challenge to mount successfully because it is an attack on the statute itself, rather than upon the application of it, and the challenging party must show that under no set of circumstances would it be constitutionally valid. *Santikos v. State*, 838 S.W.2d 631, 633 (Tex. Crim. App. 1992); *State v. Rosseau*, 396 S.W.3d 550,557 (Tex. Crim. App. 2013).

Separation of Powers

Article II, Sec. 1 of the Texas Constitution provides that:

> The powers of Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to-wit: Those which are legislative to one, those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in instances herein expressly permitted.

One way the Separation of Powers clause is violated is when one branch of government assumes or is delegated a power more properly attached to another branch. *Salinas v. State*, 523 S.W.3d 103, 106-07. (Tex. Crim. App. 2017).

Court Costs

Criminal costs are a non-punitive recoupment of the costs of judicial resources expended in connection with the trial of the case. *Weir v. State*, 278 S.W.3d 364, 366-67 (Tex. Crim. App. 2009). Thus, the collection of fees in criminal cases is part of the judicial function and does not violate the separation of powers if the statute under which they are assessed, or an interconnected statute, provides for allocation of those court costs to be expended for a legitimate criminal justice purpose. *Salinas*, 523 S.W.3d at 107. Whether the expenditure is for a legitimate criminal justice purpose is

answered on a statute-by-statute/case-by-case basis, with the answer determined by what the governing statute says about the intended use of the funds, not whether the funds are actually used for a criminal justice purpose. *Id.* If a statute turns the courts into tax gatherers, then the statute delegates to the courts a power more properly attached to the executive branch. *Id.* If, however, the statute under which court costs are assessed (or an interconnected statute) provides for an allocation of such court costs to be expended for legitimate criminal justice purposes, then the statute allows for a constitutional application and does not violate the separation of powers provision. *Peraza v. State*, 467 S.W.3d 508, 517 (Tex. Crim. App. 2015).

In *Salinas*, the Court of Criminal Appeals held that a portion of the court costs included in Section 133.102 Tex. Local Gov't Code were facially unconstitutional. *Id.* at 105. The reasoning behind this was that those statutes failed to direct the funds be used in a matter that would make it a court cost, in other words the statute failed because the funds must be used with a criminal justice purpose. *Id.* However, The Court did not find all court costs to be facially unconstitutional and thus severed the portions found unconstitutional from the Consolidated Fee Statute and modified the judgment accordingly. *Id.* Meanwhile, in *Peraza*, the Court of Criminal Appeals held that the DNA Record Fee was constitutional through the interconnected statutory provisions providing for the allocation of the funds collected as court costs to be expended for legitimate criminal justice purposes. *Peraza*, 467 S.W.3d at 521.

Here, appellant seeks to ignore *Peraza* and expand *Salinas* to encompass court costs that are legitimately used for a criminal justice purpose merely because that purpose is paid out of the general fund prior to the conviction. *See* App. Br. 38, 70. But as other courts have recognized, the holdings in *Salinas* and *Peraza*, do not render every court cost that goes through the general fund unconstitutional.

The 14th Court of Appeals correctly held in *Johnson*, two types of court costs pass the constitutional standard required: 1) statutes under which a court recovers expenditures necessary or incidental to criminal prosecutions, and 2) statutes providing for an allocation of the costs to be expended for any legitimate criminal justice purpose. *Johnson*, 573 S.W.3d 328, 333-34 (Tex. App. – Houston [14th Dist] 2019, no pet. h.), *See also Moliere v. State*, 574 S.W.3d 21, 28 (Tex. App. – Houston [14th Dist.] 2018, pet ref'd). Whether a statute falls within the first category is a backward-looking exercise, while an analysis under the second category is forward-looking. *Johnson*, 573 S.W.3d at 334; *Moliere*, 574 S.W.3d at 29.

Here, appellant seeks to invalidate five different court costs: (1) CRCF (Clerk's fee), (2) JRF (Jury Reimbursement Fee), (3) IDF (Indigent Defense Fee), (4) CRTF (Administrative Transaction Fee), and (5) Serving Writ. App. Br. 37.

CRCF (Clerk's Fee)

Article 102.005(a) mandates that a "defendant convicted of an offense in a County Court, a County Court at Law, or a District Court shall pay for the services of

the clerk of the court a fee of $40."Tex. Code Crim. Proc. art. 102.005(a). 100% of this fee goes to the general fund of the County which had funded the services of the clerk of the court through the pendency of the case. Tex. Code Crim. Proc. art. 102.005(c). Therefore, this is a backward looking cost, directed to reimburse funds already expended for a legitimate criminal justice purpose. Under the *Moliere* test, then, this court cost is constitutional.

JRF (Jury Reimbursement Fee)

Article 102.0045(a) mandates that this fee is "to be used to reimburse counties for the cost of juror services as provided by Section 61.0015, Government Code." Tex. Code Crim. Proc. art. 102.0045(a). The Government Code explains that "The State shall reimburse a county $34 a day for the reimbursement paid under Section 61.001 to a person who reports for jury service in response to the process of a court for each day or fraction of each day after the first day in attendance in court in response to the process." Tex. Gov't Code §61.0015 (a). The Government Code further requires that "the comptroller shall pay claims for reimbursement under this section quarterly to the county treasury of each county that filed a claim from money collected under Article 102.0045, Code of Criminal Procedure, and deposited in the jury service fund." Tex. Gov't Code §61.0015(c).

This court cost, likewise, is backward viewing under the *Moliere* test. Following the mandates of the statute, the County is required to pay jurors a statutory amount

($40/day) out of their general fund. Tex. Gov't Code § 61.001. The County will then, upon conviction, receive the jury service fee. Tex. Code Crim. Proc. art. 102.0045 (b). The County Clerk keeps 10%, or $4, and sends the remainder to the Comptroller for deposit in the jury reimbursement fund. The County's general fund is then reimbursed for costs already paid to jurors on a quarterly basis from that fund. Tex. Gov't Code § 61.0015. Thus, just as the court determined in tracing the flow in *Peraza*, the JSF is likewise constitutional.

IDF (Indigent Defense Fee)

The Texas Local Government Code mandates that "A person convicted of any offense, other than an offense relating to a pedestrian or the parking of a motor vehicle, shall pay as a court cost, in addition to other costs, a fee of $2 to be used to fund indigent defense representation through the fair defense account established under Section 79.031, Government Code." Tex. Loc. Gov't Code § 133.107(a). Unlike the previous two fees, this fee is forward looking. But, even Appellant acknowledges the vast majority of this is properly directed to a criminal justice purpose, being mandated to be deposited in the "Indigent Defense Account." App. Br. 62.

Appellant complains specifically that 10% of this fee is not properly directed to a criminal justice purpose, because it may be withheld by the Court Clerk through an interconnected statute. App. Br. 69. This reasoning fails because it ignores the purpose behind the retention. Local Government Code section 133.058 (a) explains

that a county may retain 10% of the money collected as a service fee for the collection if the remainder of the fees are remitted to the comptroller within the prescribed period. Tex. Local Gov't Code § 133.058(a). Reading further, you find that the Court Clerk is to all the fees into the County's treasury and remit them along with a quarterly report to the Comptroller. *See* Tex. Local Gov't Code § 133.051-133.059. This 10% retained, then, is for the services performed in collecting, depositing, maintaining, recording, and remitting all court costs on behalf of the comptroller. Thus, this 10% Appellant complains of is backward looking under the *Moliere* test. If collection of any court costs are constitutional because they further legitimate criminal justice interests, then it follows that the costs incurred by the clerk to collect and maintain an accounting of those funds must also further those same criminal justice interests. Therefore, reimbursement of the costs to collect, maintain, and account for all other constitutional court costs is likewise constitutional.

CRTF (Administrative Transaction Fee)

Under the *Moliere* test, while this fee is imposed for an action yet to be taken, it is still backward looking. Article 102.072 provides that "an officer listed in article 103.003 or a community supervisions and corrections department may assess an administrative fee for each transaction made by the officer or department relating to the collection of fines, fees, restitution, or other costs imposed by a court." Tex. Code Crim. Proc. art. 102.072. the officer who actually collects the court costs, fines, fees,

and or restitution. But as all costs must be announced upon judgment, though the collection of this is backward looking, as it cannot be taken until the required work is performed, the pronouncement is for an event that has yet to occur.

As discussed in the last section, though, this pays for the work performed in collecting the costs, fines, fees, and restitution owed by the defendant. Thus, if any of these are constitutional, then so too the collection of those costs, fines, fees, and restitution also further legitimate criminal justice purposes.

Serving Writ

Under the *Moliere* test, this fee is another backward viewing fee as it may only be charged upon the serving of a writ upon the defendant. Tex. Gov't Code § 101.021 (3). If writ is not served on the defendant then it is impermissible for the Court to assess this fee. Therefore, this fee may only be used to reimburse the County's general fund for expenditures already made for a criminal justice purpose. Thus, this court costs is constitutional.

III. Under article 42.01 of the Code of Criminal Procedure, the judgment should be modified to correct the clerical errors pointed out by Appellant.

Standard of Review

The Texas Rules of Appellate Procedure give this Court the authority to reform judgments when necessary. Tex. R. App. P. 43.2(b). Indeed, appellate courts of this state have the power to modify incorrect judgments when the necessary data and information are available. *Bigley v. State*, 865 S.W.2d 26, 27-28 (Tex. Crim. App. 1993). And the Court's authority is not dependent on the request of a party, nor a question of whether any party has or has not objected in trial court. *French v. State*, 830 S.W.2d 607, 609 (Tex. Crim. App. 1992).

Discussion

Degree of Offense

Article 42.01 of the Code of Criminal Procedure requires that the written judgment of the Court state the degree of offense for which a defendant was convicted. Tex. Code Crim. Proc. art. 42.01, Sec. 1(14). Here, Appellant was convicted of Aggravated Assault with a Deadly Weapon, which is a second degree felony. Tex. Penal Code § 22.02. Appellant's prior convictions were found true. I C.R. 118; 143; 6 R.R. 40. Thus, Appellant was punished as though the charge was a first-degree felony. Tex. Penal Code § 12.42(d). However, the judgment was written as though Appellant was charged with a first degree felony rather than just punished as such. I C.R. 118-119; 143-144. Because of this, the Court should modify the judgment to state the offense is a "Second Degree Felony Punished as a First Degree Felony."

Plea to Enhancements

The judgment reflects that Appellant pleaded "true" to both enhancements. I C.R. 118; 143. The reporter's record contradicts this showing, in fact, Appellant pleaded "not true." 6 R.R. 12. Appellee State agrees that the reporter's record is the correct statement of these two contradictory statements. Thus, for the reasons stated in the last section, the judgment should be modified to reflect that Appellant pleaded "not true."

PRAYER

WHEREFORE, PREMISES CONSIDERED, Appellee prays that the Court AFFIRM the conviction, finding that the evidence was legally sufficient to support the verdict of the jury. Further, Appellee prays that the Court AFFIRM each of the five court costs complained of as constitutional, finding that the statutes properly allocate all funds for criminal justice purposes. Finally, Appellee prays that the Court MODIFY the judgment to reflect the facts that the degree of offense should state "Second Degree Felony punished as a First Degree Felony" and that the plea to the enhancements should state "not guilty." And AFFIRM the judgment so modified.

Respectfully submitted,

Kyle Nuttall
Assistant District Attorney
Texas Bar No. 24082518

Milam County District Attorney's Office
204 N Central
Cameron, Texas 76520
Phone: 254-697-7013
Fax: 254-697-7016
Email daoffice@milamcounty.net

ATTORNEY FOR APPELLEE

CERTIFICATE OF COMPLIANCE

I hereby certify that, pursuant to Rule 9.4(i) of the Texas Rules of Appellate Procedure, Appellee's Brief contains 4,080 words, exclusive of the caption, statement regarding oral argument, table of content, index of authorities, statement of issues presented, signature, proof of service, certification, and certificate of compliance.

Kyle Nuttall

CERTIFICATE OF SERVICE

I certify that on November 15, 2019, a true and correct copy of Appellee's Brief is being or will be forwarded to Appellant's counsel by fax.

Kyle Nuttall